

## HEIRS OF SETUCK HARRY

IBLA 2000-205

Decided October 30, 2001

Appeal from a decision issued by Administrative Law Judge Harvey C. Sweitzer, reversing a decision by the Alaska State Office, Bureau of Land Management, rejecting a request to amend a Native allotment application, and approving that request. A-01489.

Affirmed.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

A BLM decision rejecting a request by a Native allotment applicant's heirs to amend his allotment application, pursuant to section 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1994), to describe other land is properly reversed when the preponderance of the evidence, adduced at a hearing, establishes that the amended description conforms to what the applicant had originally intended to claim when applying.

APPEARANCES: Chandra R. Postma, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management; Carol Yeatman, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for the heirs of Setuck Harry.

### OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Bureau of Land Management (BLM) has appealed a February 25, 2000, decision by Administrative Law Judge Harvey C. Sweitzer, reversing a February 18, 1997, decision issued by the Alaska State Office, Bureau of Land Management, rejecting a request to amend Native allotment application A-01489, and approving the amendment of that application.

The primary issue of fact in this case is whether Setuck Harry 1/ intended to claim a parcel of land on Blacksand (or Black Sand) Island, 2/

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1/ Setuck Harry has been referred to as either "Setuck" or "Situk" Harry in the various proceedings before the Department. Judge Sweitzer elected to use "Setuck." (Decision at 2 n.1.) We will follow his lead. Similarly, we will spell the river "Setuck River," in an attempt to avoid confusion.

2/ There are many references in the record to Black Sand Island and Blacksand Island. They are one and the same.

near the mouth of the Setuck River or a parcel on the west bank of the Setuck River.

On December 12, 1911, Setuck Harry, who could neither read nor write, filed an application for an allotment of 45.16 acres of public land, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970). <sup>3/</sup> His application contained the following description of the land he sought:

[A] tract of unsurveyed Public Land situate on West shore Black Sand Island near mouth Setuck River Latitude 59° 25' N Long 139° 35' W. Beginning at a 6 x 6 in post firmly set at ordinary high tide, Thence with meanders Left bank Setuck River at ordinary high tide N 14° 45' 12.40 chains, N 27° 39' W 12.50 chains, N 48° 45' W 6.20 chains, N 22° 5' W 4.43 chains, N 78° 41' W 5.00 chains to a post set at ordinary high tide, Thence East 25.00 chains to a post, Thence South 32.56 chains to a post Thence West 12.61 chains to place of beginning. Claim situate about 10 miles S.E. of Yakutat, Alaska.

(Application at 1.)

In his application, Harry and two witnesses attested that he had "occupied" the land since 1885. By letter dated January 12, 1912, Harry informed the General Land Office (GLO) that:

I am now about fifty years of age and was born and have resided on the Setuck [R]iver all my life and have hunted and fished on the land that I have applied for to provide a living for my family. And as the white fishermen are trying to crowd us off the Setuck [R]iver, I thought it best for myself and family to acquire title to this land, so that I would have a place of my own to fish and haul my net and by so doing be able to provide a living for my family so that in the future they would not be a burden on the Government. The timber on my claim is short and scrubby and very poor.

(Letter to GLO, dated Jan. 12, 1912, at 1-2, emphasis added.)

There was no statement that Harry had ever resided on the allotment claim. He later reported to the GLO that he had resided in a house on land adjacent to the 115.33-acre parcel of land "on the left (east) bank of the Setuck River, claimed by his brother (Setuck Jim), under allotment

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<sup>3/</sup> Repealed effective Dec. 18, 1971, subject to pending Native allotment applications, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1994).

application No. A-01490. <sup>4/</sup> (Harry Affidavit, dated Jan. 3, 1921; see Harry Affidavit, dated June 13, 1924 ("east side of the Setuck River"); Harry Affidavit, dated Feb. 7, 1922; Letter to Commissioner, GLO, from Ramsey, dated July 12, 1924, at 4 (A-01489).) He noted that he began living at that site "at least thirty years prior to February 16, 1909," when the land was withdrawn for the Tongass National Forest (thus placing the time of initiation of residency about 1879). He continued living there after his brother's death in 1915, and was living there in 1922. (Harry Affidavit, dated Jan. 3, 1921; see Harry Affidavit, dated June 13, 1924; Harry Affidavit, dated Feb. 7, 1922.)

GLO Special Agent Ramsey, Harry and an interpreter examined the parcel claimed by Harry at the mouth of the Setuck River on June 11, 1924. Ramsey reported that the parcel, "located along the south shore of the Setuck River near its mouth" was "level and covered with a growth of rushes and marsh grass." (Letter to Commissioner, GLO, dated July 12, 1924, at 2, 3 (A-01489). Emphasis added.) He noted that in this segment of the river, and for "some distance" up-river, the land was subject to the tides, and, because it was only four to five feet above the mean high tide line, it was "subject to overflow [even to a considerable depth] during the season of extreme high tides." Id. at 3.

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<sup>4/</sup> Harry and his brother were born on the parcel claimed by his brother and referred to as the "old homestead." They resided there since at least 1879. (Harry Affidavit, dated Feb. 7, 1922; see Harry Affidavit, dated Jan. 3, 1921; Harry Affidavit, dated June 13, 1924; Affidavit of E.M. Axelson, dated Feb. 7, 1922.) This is supported by the Feb. 7, 1922, affidavit of S.A. Gee, a longtime resident of Yakutat, who stated: "Setuck Jim and Setuck Harry jointly occupied an old homestead out near Setuk River; \* \* \* upon the death of Setuck Jim, Setuck Harry took sole possession of the property at Setuk River; \* \* \* Setuck Harry has continually, and is now occupying this old homestead." See Affidavit of Axelson, dated Feb. 7, 1922 (Jim and Harry "lived at or near the Setuk River, about 9 miles from Yakutat").

However, Harry later stated that during a June 12, 1924, field examination, GLO Special Agent James A. Ramsey determined that his house was not located on his brother's parcel. (Harry Affidavit, dated June 13, 1924.) This is borne out by a report of that examination which Ramsey submitted to the Commissioner, GLO. (Letter to Commissioner, GLO, dated July 12, 1924, at 3 (A-01490).) Harry then sought to amend his brother's claim (which he had inherited) to encompass the house. (Harry Affidavit, dated June 13, 1924.) Ramsey made this amendment. (Letter to Commissioner, GLO, from Ramsey, dated July 12, 1924, at 3-6 (A-01490); Ex. 24 (Survey No. 1863 of Jim Allotment Claim, approved by Ramsey on Nov. 20, 1924).) This amendment enlarged Setuck Jim's claim to the northwest. Compare Harry Affidavit, dated June 13, 1924, and Ex. 24 with Letter to Register from Commissioner, GLO, dated Feb. 21, 1922, at 2 (quoting from Application No. A-01490).

Ramsey found no improvements on the parcel, and noted that Harry "admits that no improvements were ever on the land," since "the wind blew so hard it would blow the house away." (Letter to Commissioner, GLO, dated July 12, 1924, at 3 (A-01489).) Ramsey reported that Harry stated that about 10 years before (around 1914) he had constructed a one-room frame house, which Ramsey found "approximately two hundred yards south of the south end of the [parcel]." Id. Ramsey further noted:

[Harry] does not claim to have resided on the land included in [his] allotment application, but claims to have lived for a short time each year during the fishing season in the house on the tract south of the allotment. The applicant is a brother of Setuck Jim, who had an allotment some two miles up the Setuck River from this land, and he claims to have lived on the lands included in his brother's allotment application [A-01490] since the death of his brother, which occurred several years ago. He also has a house in the village of Yakutat, where he lives during the winter season.

Id. at 4, emphasis added. Ramsey noted that Harry's claim of occupancy "appears to be founded on the fact that [he] has fished along the Setuck River," including that segment running along the boundary of his claimed land, "for the past thirty years." Id. Ramsey recommended that Harry's allotment application be rejected because Harry was unable to confirm his beneficial use or occupation of the particular parcel of land. Id. at 4-5.

Harry died in the early 1940's, and since his death his application has been pursued by his heirs. On October 21, 1996, Harry's heirs, acting through the Yakutat Tlingit Tribe, asked BLM to amend Harry's original allotment application to describe land on the right (or west) bank of and near the mouth of the Setuck River in protracted sec. 36, T. 28 S., R. 34 E., Copper River Meridian, Alaska. They noted that this tract (known as "Camp B" or "Camp 2") had been the site of a "cabin," in which Harry and his descendants had resided before it washed away. (Letter to BLM, dated Oct. 17, 1996, at 1; see Letter to BLM from Nellie Lord, dated Jan. 7, 1997, at 1; Letter to BLM from Lena Farkas, dated Jan. 10, 1997; Affidavit of Barbara E. Johnson; Affidavit of Marie S. Shodda, dated Jan. 14, 1997.) Harry's heirs noted that this area was not Harry's "fishing area," although Harry and his descendants fished and hunted in the area while living at the cabin. (Letter to BLM from Lord, dated Jan. 7, 1997, at 1; see Letter to BLM from Farkas, dated Jan. 10, 1997; Affidavit of Johnson.)

Relying initially on the latitudinal and longitudinal coordinates in the application, BLM determined that the allotment claim was situated in the Gulf of Alaska. (BLM Notice, dated Nov. 27, 1996, at 1; Tr. 234.) Later, based on the reference to the location of the claim "on West shore Sand Island near mouth Setuck River," BLM identified Harry's claim as being on the west end of "Blacksand" island, in protracted sec. 3, T. 29 S., R. 35 E., Copper River Meridian, Alaska, and within the Tongass National Forest. (BLM Notice, dated Nov. 27, 1996, at 1; Tr. 234-35.)

On February 18, 1997, the Alaska State Office, BLM, rejected the heirs' amendment request because of the "contradictory" evidence offered by the heirs regarding whether Harry had used and occupied land two miles upstream from the eastern parcel on either the right or left side of the Setuck River. "It seems that it is more likely than not that the land Setuck Harry[] [originally] intended to claim is as described on his application [on Blacksand Island]." 5/ (BLM Decision at 5.) BLM recognized that it was likely that Harry had "used many areas along the Setuck River," in addition to the site on Blacksand Island, but that he applied for only the parcel on that island. *Id.* at 4. Harry's heirs appealed to this Board, and their appeal was docketed as IBLA 97-320.

In response to a joint request by Harry's heirs and BLM, on June 19, 1997, the Board referred the appeal to the Hearings Division, Office of Hearings and Appeals, for a hearing and decision on the question of whether the heirs' October 17, 1996, request to amend Setuck Harry's Native allotment application, A-01489, should be granted, pursuant to section 905(c) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(c) (1994). The case was assigned to Judge Sweitzer, who conducted a two-day hearing on June 15, and 16, 1999, in Yakutat, Alaska, and rendered a decision on February 25, 2000, reversing BLM's February 1997 decision and approving the amendment request.

BLM has appealed Judge Sweitzer's decision, asking the Board to reverse his decision and remand the case to BLM for adjudication of Harry's claim to what it describes as the second eastern parcel, to the extent that it still exists. (SOR at 2-3, 14-15, 21.)

When BLM appeals an administrative law judge's decision, BLM has the burden of showing that the administrative law judge erred. Roblee Coal Co. v. OSM, 130 IBLA 268, 276 (1994); Yankee Gulch Joint Venture v. BLM, 113 IBLA 106, 129 (1990); See Mallon Oil Co., 107 IBLA 150 (1989). An administrative law judge's decision in a native allotment application case will be upheld on appeal if it is supported by a preponderance of the evidence in the record. See United States v. Heirs of Ambrose Kozevnikoff, *supra*, at 133.

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5/ In its conclusion regarding what land Harry had originally intended to claim, BLM relied on what was "more likely than not." (BLM Decision at 5.) It thus utilized the "preponderance of the evidence" test. See Woods Petroleum Co., 86 IBLA 46, 50 (1985). However, in the preceding sentence, BLM also stated that the evidence was "not clear and convincing enough to change the location of Setuck Harry's claim from that described on his application." (BLM Decision at 5.) This is the stricter "clear and convincing evidence" test, which is not applicable to factual determinations concerning Native allotment applications. See United States v. Heirs of Ambrose Kozevnikoff, 128 IBLA 130, 132-34 (1993), *aff'd*, Kozevnikoff v. United States, No. A95-0475-CV (HRH) (D. Alaska Mar. 24, 1997); Peter Paul Groth, 99 IBLA 104, 111 (1987).

[1] Section 905(c) of ANILCA, enacted December 2, 1980, provides that a Native allotment application may be amended by the applicant if the amended, rather than the original, land description designates the land which the applicant "intended to claim at the time of application."

43 U.S.C. § 1634(c) (1994); The Estate of Stan Paukan, 146 IBLA 204, 208 (1998). The authority to amend an application extends to the applicant's heirs. Heirs of Edward Peter, 122 IBLA 109, 116 (1992) (citing Olympic v. United States, 615 F. Supp. 990, 995 (D. Alaska 1985)).

To justify an amendment the evidence should clearly indicate a reasonable likelihood that the land described by the amendment was the land the applicant actually intended to claim when the original application was filed. 6/ Angeline Galbraith, 97 IBLA at 147, 94 I.D. at 159. It is not enough that the land described in the proposed amended application is other land the applicant would have desired to select. In State of Alaska (Helen M. Austerman), 119 IBLA 260, 266 (1991), we stated:

[S]ection 905(c) of ANILCA is only intended to permit, subsequent to [repeal of the 1906 Act on] December 18, 1971, the amendment of a Native allotment application so that it accurately reflects the land which the applicant had originally intended to claim, but that through some error was misdescribed, in the application, and not to permit the substitution of new or additional land which the applicant had not originally intended to claim.

An "error" might result from either the improper placement of the allotment claim on a protraction diagram or some other error in the generation of the land description. See S. Rep. No. 413, 96th Cong., 2d Sess. 286 (1979), reprinted in 1980 U.S.C.C.A.N. 5070, 5230; Stephen Northway, 96 IBLA 301, 307 n.5 (1987). An amendment can either shift the location of the claim, change its configuration, or both. The intent is to have the claim encompass the "actual, on-the-ground location of the lands purportedly used and occupied." United States v. The Heirs of David F. Berry, 127 IBLA 196, 207 (1993).

As previously noted, this case concerns whether Harry intended to claim the parcel at the western tip of Blacksand (or Black Sand) Island,

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6/ In Angeline Galbraith, 97 IBLA 132, 147, 94 I.D. 151, 159 (1987), we set forth factors deemed relevant when trying to determine a Native applicant's original intent. They concern the geographic positions of the land originally described in the application and the land now sought under the proposed amendment, their location relative to landmarks or improvements, the history of the legal status of the underlying land, and the applicants' activities since filing his application. These factors are intended to help discern whether the applicant really intended to claim land not described in his application, especially when the applicant can no longer speak for himself. It was not intended that the list should be all inclusive, as each case should be decided on the basis of its facts.

near the mouth of the Setuck River (eastern parcel) described in his original 1911 application, or, the parcel slightly upstream on the right (or west) bank of the river (western parcel), described in the Harry's heirs' 1996 amendment request. During the course of the examination of Harry's claim, the allotment was described as being in at least 5 separate locations. Most of these conflicting descriptions were developed by BLM, and each of them was given in an attempt to clarify the original location set out in Harry's application. See Tr. 168.

BLM originally located the eastern parcel on the Blacksand Island which was in existence at the time of its February 1997 decision. It now locates the parcel on that island as it purportedly existed when Harry filed his application in 1911, moving the parcel from protracted sec. 3 to protracted sec. 4, T. 29 S., R. 35 E., Copper River Meridian, Alaska. 7/ (SOR at 2-3; BLM Post-Hearing Brief at 2.) The western parcel, the parcel sought by Harry's heirs in their amendment request, is located less than a mile northwest of the BLM described parcels, in protracted sec. 36, T. 28 S., R. 34 E., Copper River Meridian, Alaska. 8/

In its February 18, 1997, decision, BLM held that Harry had sought the first eastern parcel, on Blacksand Island. Judge Sweitzer concluded that Harry had sought the western parcel, on the mainland along the Setuck River, near Blacksand Island. He also implicitly rejected the assertion BLM made in its post-hearing brief that Harry had originally intended to claim a "second eastern" parcel of land on Blacksand Island.

The evidence strongly supports Judge Sweitzer's finding that the land description in Harry's 1911 application is, at most, confusing, and provides little or no insight into what he originally intended to claim. There is no dispute that the latitudinal and longitudinal coordinates, set forth in the application, place the claimed land in the Gulf of Alaska. (BLM SOR at 3; Decision at 5; see Master Title Plat (MTP) (T. 29 S., R. 35 E., Copper River Meridian, Alaska), dated Sept. 4, 1980; BLM Notice, dated Nov. 27, 1996, at 1; Ex. 28.) Nonetheless, these coordinates place

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7/ On appeal, BLM has not stated where it currently believes Harry's claim should be located with any degree of specificity. So far as we can discern, based on its interpretation of the testimony and other evidence offered at the hearing, BLM now contends that the claim is properly located in protracted sec. 4, at the tip of the Blacksand Spit, which was once considered part of Blacksand Island. (BLM Post-Hearing Brief at 2.) However, this conclusion is contradicted by the only testimony offered by BLM at the hearing. Robert A. Perry, the Land Law Examiner who prepared BLM's Feb. 18, 1997, decision, testified that it "seem[ed]" from the other testimony that the land originally claimed by Harry on the island "no longer exists." (Tr. 264.)

8/ Harry's heirs generally place the amended parcel in protracted sec. 36, but indicate that small portions may also be in protracted secs. 4 and 5, T. 29 S., R. 35 E., and sec. 31, T. 28 S., R. 35 E., Copper River Meridian, Alaska.

the claimed land in what would be protracted sec. 8, T. 29 S., R. 35 E., Copper Meridian, Alaska, and thus in the general vicinity of both the eastern parcel, originally adopted by BLM, and the western parcel sought by Harry's heirs. (Ex. 29.)

The description in Harry's application refers to land on the west shore of Blacksand Island. Reliance on this reference is made difficult by the fact that both the heirs and BLM agree that the location and configuration of the island has changed since 1911.

BLM expressed the opinion that the island "no longer exists as it did in Setuck Harry's day," and that most of the land originally claimed by him may have eroded away. (SOR at 14.) This assertion forms the basis for its contentions that Judge Sweitzer's February 2000 decision should be reversed, and that the case should be remanded to allow it to adjudicate Harry's claim to land on the island, as it originally existed when Harry applied in 1911.

There is little question that the island has changed since 1911. At times what is now called "Blacksand Spit" has been connected to "Blacksand Island," and the island extended further up the coast and across the point where the Setuck River enters a small bay before flowing into the Gulf of Alaska. However, we do not find that the reconfiguration of the island, which was clearly an identifiable land feature at the time of Harry's application, is a basis for our finding error. <sup>9/</sup> See Tr. 74-76, 118-19, 173-74, 176-77, 205-10, 249; Exs. H, O, 23-A, 28, and 29; Ex. I at 2. BLM made no attempt to show where the island was in 1911, or what portion still remains. <sup>10/</sup>

The application described the western boundary of the parcel as following "meanders [of the] Left bank [of the] Setuck River." We agree with Judge Sweitzer's conclusion that this description was not accurate. (Decision at 5.) Record evidence places the island in a tidal flat area between the mainland and the Gulf of Alaska. (Exs. O, 23-A, 28, and 29.)

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<sup>9/</sup> Lord stated that in the late 1800's and early 1900's, Blacksand Island was two miles from the "current" Gulf of Alaska shoreline. (Letter to BLM, dated Jan. 7, 1997, at 1.) Her later statement that, at some time, the spit and island were combined to form the "original" island contradicted that statement. *Id.* at 2. At the hearing, she corrected her written statement and agreed with Farkas that the spit was considered part of the island at the time of Harry's application. (Tr. 74-78, 118-20; Ex. 23-A.) <sup>10/</sup> BLM also errs in suggesting that the Department should just afford Harry's heirs another parcel in place of the one originally claimed by Harry which may have completely eroded away. (SOR at 14.) This is no longer permissible, given the repeal of the 1906 Act. *Hermann T. Kroener*, 124 IBLA 57, 62, 64-65 (1992). If the land no longer exists, Harry's application must be rejected. *State of Alaska (Helen M. Austerman)*, 119 IBLA at 270-71.



Blacksand Island lies northwest-southeast, and is separated from the mainland by a narrow band of water called the "Middle Slough." "Blacksand Spit" lies southwest of Blacksand Island separated from the island by a narrow band of water, considered part of the Ahmklin River, and is connected to the Alaska mainland to the southeast.

The mouth of the Setuck River is a short distance northwest of the western end of Blacksand Island. The left bank of the river terminates at the edge of the Middle Slough. The evidence supports a finding that this configuration existed in 1911, as Blacksand Island was known to exist at that time. The meanders of a river are normally described by reference to "ordinary high tide." However, when referring to the last stretch of the River, we find little support for BLM's assertion that the shore of an island near the mouth of a river is customarily described by reference to the meanders of the river. (SOR at 20.) The fact that the island was described using meanders of the river undermines any conclusion that Harry sought a tract of land on the island.

We find ample support for Judge Sweitzer's finding that Harry was competent to manage his own affairs, but unable to speak, read, or write English when he signed his application. (Decision at 3 (citing Tr. 25, 45, 52); Tr. 107; Letter to BLM from Farkas, dated Jan. 10, 1997; Letter to Commissioner, GLO, from Ramsey, dated July 12, 1924, at 4 (A-01490); Letter to Commissioner, GLO, from Register, dated Mar. 4, 1912.) Thus, the accuracy of the description of the land in the application hinged upon the accuracy of the translation of Harry's intentions, and the competence of the transcriber regarding preparation of accurate legal descriptions. Considering the overt errors in the description (see BLM SOR at 4), we agree with Judge Sweitzer's conclusion that it was a very shaky foundation. 11/ (Decision at 8.)

Judge Sweitzer held that the preponderance of the evidence shows that Harry originally intended to claim the parcel now sought by the heirs. We agree with that conclusion.

In its February 1997 decision, BLM rejected the heirs' amendment request because, in the face of "contradictory" evidence offered by the heirs regarding whether Harry had used and occupied land two miles upstream from the eastern parcel on either the right or left side of the River, "[i]t seems that it is more likely than not that the land Setuck Harry[] [originally] intended to claim is as described on his application [on

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11/ We acknowledge that Harry was assisted by an interpreter during Ramsey's 1924 field examination of his claim. (SOR at 18-19.) However, this does not dispel our concern regarding the accuracy of Harry's 1911 application. There is no evidence regarding the nature or competence of the assistance Harry received in 1911. The inherent contradiction of a description placing a tract entirely in the ocean, on the shore of an island, and by meanders along a river, undermines any reliance on the description's accuracy.

Blacksand Island]." (BLM Decision at 5.) BLM concluded that Harry originally intended to claim only the eastern parcel. It acknowledged that he had also used and occupied land two miles upstream of that parcel, and was dissuaded from holding that Harry had intended to claim the land upstream because of the contradictory evidence offered by the heirs. The preponderance of the evidence adduced at the hearing supports Judge Sweitzer's conclusion that it was Harry's intent to claim land upstream, and that the land was situated on the right (or west) side of the Setuck River.

The confusion in this case appears to stem from the fact that, when Harry filed his allotment application in 1911, he was using and occupying land on Blacksand Island and land on the Setuck River, also near its mouth. <sup>12/</sup> See, e.g., Tr. 29–30. In his January 1912 letter, Harry stated that he had "resided on the Setuck [R]iver," but indicated that he was specifically seeking other land along the river, where he had "hunted and fished," and that he desired to maintain the right to continue to hunt and fish there to support his family. (Letter to GLO, dated Jan. 12, 1912, at 1–2.) The purpose of his application was not to provide a residence for his family, but to provide the food resources. This squares with BLM's conclusion that Harry did not intend to claim the land on which he resided.

In three 1912 affidavits, executed by J.T. Robinson, Tom Megard, and jointly by John Beverly, Tom Iverson, and I. Severson, (Robinson et al.), the affiants attest to the fact that for the preceding several years Harry had not occupied the lands "situated on the west shore of Black Sand Island near the mouth of [the] Setuck River \* \* \*, or any part thereof, as a residence or as a habitation." (Robinson Affidavit, dated Jan. 6, 1912.) All identified Harry's residence during that time period as being "up the Setuck River about two miles above the premises described in his said allotment application." Id. This places Harry's residence on or near the allotment claimed by his brother Setuck Jim (A–01490).

The confusion in the record is compounded by the fact that both Harry and his brother (Setuck Jim) had applied for an allotment on December 12, 1911, and that, by the time GLO examined Harry's claimed land in 1924, Harry had inherited and was pursuing Jim's claim.

Harry's brother Jim claimed 115.33 acres situated "about 8 miles from Yakutat on Yakutat and Southern [Railroad] in Lat[itude] 59° 27' N., Long[itude] 139° 35' W., on left bank of Setuck River." (Letter to Register from Commissioner, GLO, dated Feb. 21, 1922, at 2 (quoting from Application No. A–01490).) There is evidence that Harry resided on land adjacent to that claimed by his brother. In a December 13, 1921, decision, the First Assistant Secretary reported, at page 4, that Harry, who was

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<sup>12/</sup> Evidence adduced at the hearing supports a conclusion that Harry used and occupied land on the island: "[Harry] fished 'every now and then' at Blacksand Island (Tr. 39–40, 73–78, 102–03; Ex. 8). He had a shed there for storing fishing equipment but he did not live there, staying overnight only occasionally (Tr. 39–40, 73–78, 96–97; Ex. 15)." (Decision at 4.)

pursuing his brother's claim, had said that Jim's claim "is where [he and his brother] had their homes." See Tr. 28–29, 43–44, 65, 94, 132; Ex. 14; Ex. E at 7–8. This indicates that Harry's primary residence was on Jim's claim. 13/ However, Harry stated, in affidavits dated Jan. 3, 1921, Feb. 7, 1922, and June 13, 1924, that he resided in a house adjacent to his brother's claim. Because his house was not within the boundaries of Jim's claim, Jim's application was amended in 1924, at Harry's request. This is evidently the site of Harry's residence as identified in the Robinson et al. affidavits. 14/

Ultimately, Jim's allotment claim was placed in secs. 30 and 31, T. 28 S., R. 35 E., and secs. 25 and 36, T. 28 S., R. 34 E., Copper River Meridian, Alaska, on the left (or east) bank of the Setuck River. That tract (93.13 acres) was later allotted to Harry in satisfaction of his brother's application (No. A–01490), and he received the land on which he and his brother had resided.

Harry's heirs contend that there was an additional parcel used and occupied by Harry situated on the right (or west) bank of the Setuck River and downstream from the land ultimately allotted to Harry as Jim's heir. The preponderance of the evidence supports that contention.

In 1924, after examining the land claimed by Harry under application No. A–01489, GLO Special Agent Ramsey reported that it was situated "along the south shore of the Setuck River near its mouth." 15/ (Letter to Commissioner, GLO, dated July 12, 1924, at 2 (A–01489), emphasis added.) Land at the western end of the Blacksand Island cannot be said to be on a \_\_\_\_\_

13/ In a Jan. 18, 1922, letter to the Commissioner, GLO, the Acting Secretary noted that the applications of Harry (A–01489) and Jim (A–01490) were "for adjoining land." He described Harry's claim as "situated on the left bank of the Setuck River about eight miles from Yakutat, Alaska" (it was actually "about 10 miles S.E. of Yakutat"). This may explain the erroneous conclusion that the two claims were for adjoining land. Id.; see Letter to Register from Commissioner, GLO, dated Feb. 21, 1922, at 2 ("Claim [No. A–01490] is situate about 8 miles from Yakutat") (quoting from Application No. A–01490); Application No. A–01489, dated Dec. 12, 1911. Another possibility is that the Acting Secretary had confused the proximity of their homes with the proximity of their allotment claims.

14/ There is nothing in the Robinson et al. affidavits supporting BLM's placement of Harry's claim on Blacksand Island. See BLM SOR at 10–11. At best they support the conclusion that he did not reside there.

15/ Ramsey's July 1924 letter quotes the land description in Harry's 1911 application, thus referring to the "'West shore Black Sand Island, near mouth of Setuk River.'" (Letter to Commissioner, GLO, dated July 12, 1924, at 1 (A–01489).) However, this does not agree with Ramsey's placement of the claim "along the south shore of the Setuk River." As the latter description is in his own words and based on his personal observations, it merits greater significance. Id. at 2. We are not dissuaded by Lord's speculation at the hearing that Ramsey must have been on the island when he examined Harry's claim. (BLM SOR at 13 (citing Tr. 122, 126–27).)

shore of the Setuck River. <sup>16/</sup> On the other hand, the land sought by the heirs is on the southwestern shore of the Setuck River. The right bank of the river, which generally runs in a southerly direction, makes a pronounced turn to the east just before entering the tidal flat and exiting into the Gulf of Alaska. See Exs. O, 23–A, and 28. Farkas indicated in her testimony that the right bank of the river may have extended further to the east about the turn of the century, creating more of a southern shore. (Tr. 36, 142–43; see Tr. 207, 209; Ex. O; Ex. 28 (depicting marsh area extending east from terminus of right bank of river.) We can find no other segment of the river in this area with a "south shore."

Further proof that Ramsey referred to the area Harry's heirs seek on the "south shore" of the Setuck River is found in his report of his June 12, 1924, examination of Jim's claim. In that report he described Jim's claim as being on the "northeast side of the Setuck River." (Letter to Commissioner, GLO, dated July 12, 1924, at 4 (A–01490).) The fact that Harry's claim was stated by Ramsey to be on the "south shore" of the river and fairly near its mouth places the claim on or very near the land now sought by the heirs. See Tr. 89–90, 193–94. It rules out the western tip of Blacksand Island. <sup>17/</sup>

In both reports, Ramsey stated that the stretch of the river bordering the two claims was subject to "extreme high tides," which extended further up the river. (Letter to Commissioner, GLO, dated July 12, 1924, at 4 (A–01490); Letter to Commissioner, GLO, dated July 12, 1924, at 3 (A–01489).) This supports a conclusion that their claims were near the mouth of the river.

We note that Ramsey also reported that Harry had stated that he had never had any improvements on the land he claimed. (Letter to Commissioner, GLO, dated July 12, 1924, at 3 (A–01489).) While this might seem to discount the land now sought by the heirs, who assert that Harry had a cabin on that land, we note that Ramsey reported that Harry had stated that he could not place a house on his claim because of adverse wind conditions,

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<sup>16/</sup> We find it hard to agree with Judge Sweitzer's statement that Ramsey's description of the location of the claim, in his 1924 report, is equally "consistent with the tract being on Blacksand Island." (Decision at 7 (citing Tr. 175–76, 189, 241–51).) However, this is not sufficient basis for a conclusion that Judge Sweitzer committed a material error requiring reversal.

<sup>17/</sup> Walter A. Johnson, a realty officer with the Yakutat Tlingit Tribe, testified that water never overflows the western tip of Blacksand Island. (Tr. 168; see Ex. 28.) A videotape (Ex. 22) shows that water overflows the land sought by Harry's heirs, leaving large logs. See Tr. 188–89. Ramsey's report states that: "The entire tract \* \* \* [is] subject to overflow during the season of extreme high tides. Large logs of driftwood are scattered over the tract[.]" (Letter to Commissioner, GLO, dated July 12, 1924, at 3 (A–01489).)

and that in about 1914 he "built a house approximately two hundred yards south of his tract." Id., emphasis added.

BLM indicates that Harry was simply referring to the house he had built adjacent to his brother's claim on the left (or east) bank of the river, since he had taken Ramsey to land "different \* \* \* th[a]n he claimed in his application," and very likely the land claimed by his brother. (BLM Decision, dated Feb. 18, 1997, at 4; see Tr. 248; Ex. 7 at 1.) However, there is no evidence to support this conclusion. <sup>18/</sup> Ramsey examined the parcels claimed by Jim and Harry on succeeding days, while accompanied by Harry and an interpreter. This calls to question any assertion that Ramsey erroneously described Harry's claim as Jim's but got Jim's correct. See BLM Post-Hearing Brief at 18 ("Since Ramsey is the same person who examined Setuck Jim's claim \* \* \* just one day later \* \* \*, the inference can be made that Ramsey's determination of which lands Setuck Harry originally intended to claim and Ramsey's description of those lands were reliable and accurate"). Ramsey identified Jim's claim as being situated near the terminus of the Yakutat and Southern Railroad, but made no mention of those landmarks in his description of Harry's claim. Compare Letter to Commissioner, GLO, from Ramsey, dated July 12, 1924, at 3 (A-01490) with Letter to Commissioner, GLO, from Ramsey, dated July 12, 1924, at 2-4 (A-01489). When describing his examination of Harry's claim he also noted that Jim's claim was "some two miles up the Setuck River from this land." <sup>19/</sup> (Letter to Commissioner, GLO, dated July 12, 1924, at 4 (A-01489).)

The weight of the evidence supports the conclusion that Ramsey did not mistakenly examine the land claimed by Jim, thinking that it was the land claimed by Harry, under application No. A-01489. It does support the conclusion that the circa 1914 house Harry described to Ramsey during the examination of his claim was not the house adjacent to his brother's claim he described in his 1921, 1922, and 1924 affidavits as where he lived (dating back to at least 1879).

We find no evidence that this house could have been any distance "south" of Harry's claim if it were placed at the western tip of Blacksand

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<sup>18/</sup> We do not accept BLM's implication that, because Harry stated that he paid to have his claim surveyed and paid half the cost of having Jim's claim surveyed in 1911, Ramsey did not know whether he was on Harry's, or Jim's, claim. (BLM Decision, dated Feb. 18, 1997, at 4.)

<sup>19/</sup> The land at the western tip of Blacksand Island BLM deems to have been claimed by Harry is over a mile from the land claimed by Jim. The land Harry's heirs believe was actually claimed by Harry is less than a mile from Jim's claim. (Decision at 4 ("The two [claims] were approximately one to one and one-half miles apart ([Tr.] 61, 79-80)"); Tr. 60-61, 288-90; Exs. O and P.) In the absence of any evidence that Ramsey accurately measured the distance between the two claims, the statement that they were "some two miles" apart does not undermine Harry's heirs' location of Harry's claim.

Island. See Tr. 245–46. We, thus, agree with Judge Sweitzer. (Decision at 5.) In addition, in their 1912 affidavits Robinson et al. stated that Harry did not live on Blacksand Island. This was supported by evidence adduced at the hearing that he stayed overnight on the island "only occasionally." (Decision at 4 (citing Tr. 39–40, 73–78, 96–97).) It seems likely that Harry was referring to a house on the mainland.

Ramsey placed Harry's claim "along the south shore of the Setuck River near its mouth." The evidence supports a conclusion that the house Ramsey described was the cabin described by the heirs. 20/ Judge Sweitzer found that:

[Harry] built a two-story, multi-room house near some trees on th[e] land prior to 1900 and used it as his primary residence until his death in 1942 or 1944 (Tr. 25, 31–32, 35–39, 43–44, 50, 63, 68, 97–98, 210–12, 216–17; Exs. O, 25, 26). There was also a smokehouse, outhouse, and a well, which was an important source of water (Tr. 31–32, 108–09, 188–89).

(Decision at 4.)

We agree. The location of this cabin was established by the undisputed statements of Harry's descendants, Lord, Farkas, and Shodda. (Letter to BLM from Lord, dated Jan. 7, 1997, at 1 ("Cabin \* \* \* was located up the Setuck River, around the bend that existed at that time, and sheltered by the sand dunes"); Letter to BLM from Farkas, dated Jan. 10, 1997 ("Setuck Harry applied for 45 acres at Camp B by the mouth of Setuck River"); Affidavit of Shodda, dated Jan. 14, 1997 ("The application for allotment A[–]01489 was suppose to be at Camp B and not on Black Sand Island").) Harry's cabin was on the land in protracted sec. 36 that Harry's heirs now seek. Their statements are supported by the evidence adduced at the hearing:

Several witnesses, including two granddaughters of [Harry], testified more specifically that [Harry's] intent was to claim Camp 2 [which is the land now sought by the Heirs in protracted sec. 36] as his allotment (see, e.g., Tr. 26–27, 40, 108–09, 112–13).

The granddaughters were born in the 1930's and based their testimony upon the often repeated statement of their mother, a daughter of [Harry], that Camp 2 was the land her

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20/ Ramsey also reported that the house he observed was in U.S. Survey No. 403. (Letter to Commissioner, GLO, dated July 12, 1924, at 3–4 (A–01489).) A 15.38-acre tract surveyed as U.S. Survey No. 403, in sec. 32, T. 28 S., R. 35 E., Copper River Meridian, Alaska, is in the vicinity of the land at issue. (Ex. P.) There is no suggestion that Harry intended to claim land north of that tract, and Ramsey may have been mistaken when describing the house as in that tract. See Tr. 246–48, 253.

father intended to claim (Tr. 27–28, 40, 95, 103–04, 113). Like many relatives of [Harry], they lived at Camp 2 with him or after his death (Tr. 107, 109, 204, 218).

It was common knowledge that [Harry] lived at Camp 2 and claimed it as his own (Tr. 200–01, 212–13, 220–21, 223). \* \* \* Consistent with the Tlingit principles regarding property, other people respected [Harry's] claim to Camp 2 and no one other than [Harry] has claimed it (Tr. 197–98[, 285]). [21/]

(Decision at 4; see Tr. 32–34, 104–05; Ex. 23–A; MTP (T. 29 S., R. 35 E., Copper River Meridian, Alaska), dated Nov. 18, 1996.

Finally, the evidence in the record that the land at "Camp 2" is where Harry and his descendants hunted and fished agrees with Harry's January 1912 statement that he intended to claim the area, along the river, where he "hunted and fished \* \* \* to provide a living for my family." (Letter to GLO from Harry, dated Jan. 12, 1912, at 2; see Letter to Commissioner, GLO, from Ramsey, dated July 12, 1924, at 3–4 (A–01489); Letter to BLM from Lord, dated Jan. 7, 1997, at 2; Letter to BLM from Farkas, dated Jan. 10, 1997; Affidavit of Johnson; Tr. 39, 94.) The evidence of the location of Harry's cabin supports the conclusion that Harry originally intended to claim the land now sought by Harry's heirs in protracted sec. 36.

There are conflicts and uncertainties in the evidence in this case. Nonetheless, we agree with Judge Sweitzer's finding that a preponderance of the evidence in the record supports the heirs' position that Harry sought the same parcel they seek, and BLM has failed to demonstrate error on appeal.

Further adjudication by the Department of the Harry's heirs' entitlement to an allotment of this land, under the 1906 Act, may now

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21/ We agree with BLM that Farkas' and Lord's statements at the hearing that Harry had originally intended to claim land in protracted sec. 36, were double hearsay, since they were based on what had been told to them by their mother and attributed to Harry. (SOR at 6; see id. at 12–13.) We note, however, that their mother was 20 years old when Harry applied for the land, and thus her recollections were those of an adult. (Tr. 63–64.) Further, we find no hesitancy in the identification of the land, especially by Farkas: "Harry applied for 50 acres on the west bank of the mouth of the river \* \* \*. My mother told me exactly which area my grandfather claimed." (Ex. 19 (Statement of Farkas) at 1.) This land was also identified by Farkas' uncle, who had accompanied Harry during Ramsey's 1924 field examination. (Tr. 94–95.) Shodda, who was not available to testify at the time of the hearing, reportedly based her identification of the land sought by Harry on his statements to her: "Setuck Harry told me stories about living at Camp B ever[] since he was a child in the late 1880's." (Affidavit of Shodda, dated Jan. 14, 1997.)

proceed. We make no determination in that respect. Nor do we determine exactly what land should be included or who should be considered an heir of Harry, should BLM decide to approve the application for that land.

To the extent not addressed herein, all other errors of fact or law asserted by BLM are rejected, on the grounds that they are either contrary to the facts or law, or immaterial.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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R.W. Mullen  
Administrative Judge

I concur:

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Bruce R. Harris  
Deputy Chief Administrative Judge

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fn. 21 (continued)

We also cannot discount the testimony and other evidence offered by Harry's relatives and especially others that Harry had, by reputation and personal recollection, a cabin in protracted sec. 36, which had been used not only by his descendants, but also by him. (Tr. 104-05, 109-11, 200-06, 215-23; Exs. 19-21, 23-A, 23-B, 26, H, and O; Ex. I at 1-2.) The presence of a cabin, which was used by Harry, certainly supports the assertion that he originally intended to claim land in its immediate vicinity.